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Via email: [iipp2018@ntia.doc.gov](mailto:iipp2018@ntia.doc.gov)

July 17, 2018

Ms. Fiona Alexander  
Associate Administrator  
Office of International Affairs  
National Telecommunications & Information Administration  
U.S. Department of Commerce  
1401 Constitution Ave., N.W.  
Washington, D.C. 20230

Re: [Response to NTIA Notice of Inquiry on International Internet Policy Priorities](#)

Dear Ms. Alexander:

The International Trademark Association (“INTA”) appreciates this opportunity to provide comments in response to the NTIA’s Notice of Inquiry on International Internet Policy Priorities (the “NOI”) published on June 5, 2018. We are pleased to provide comments directed at the questions posed in Section II. Multistakeholder Approach to Internet Governance with emphasis on the International Corporation for Assigned Names and Numbers (ICANN’s) processes.

INTA’s views on this topic are informed by its mission as an association “dedicated to supporting trademarks in order to protect consumers and to promote fair and effective commerce.”<sup>1</sup> The internet as a powerful engine of commerce touches on various interests of trademark owners, as well as the billions of consumers which engage in e-commerce and other activities online. This belief that trademarks protect consumers is itself based on a more fundamental conviction that attribution fosters accountability.<sup>2</sup> Trademarks have always been, at their core, source identifiers because they are used to identify and distinguish the goods or services of one person or entity from those of another. This attribution function of trademarks fosters accountability, creating an incentive for sellers to maintain a predictable, consistent quality for their goods. That consistency in turn protects consumers who rely on trademarks to make quick, confident, and safe purchasing decisions. That accountability also protects consumers by assigning responsibility, because

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<sup>1</sup> <http://www.inta.org/About/Pages/Overview.aspx>.

<sup>2</sup> The link between transparency and accountability is a fundamental tenet not just for INTA but also for ICANN, as reiterated in Article III of the ICANN Bylaws and the 2009 Affirmation of Commitments with the United States Department of Commerce. See <https://www.icann.org/resources/pages/governance/bylaws-en/#III> and <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>.

without trademarks a seller's low-quality products would be untraceable. Consumers are left without any recourse for faulty, deficient, or unsafe goods. Trust, legal responsibility and accountability are major themes in internet governance and run through many of the questions which are posed in the NOI and strike at the core of ICANN's mission.

## **1. The Multistakeholder Approach at ICANN**

INTA wishes to comment specifically on the multistakeholder approach in the context of ICANN. The multistakeholder approach is a complex system which depends on a framework of trust, accountability and certainty for it to succeed. It also relies on the good faith of the participants and a willingness to compromise. In many ways, the operation of this model at ICANN has proven its workability despite suffering certain imperfections. Whether the multistakeholder model is a success should not be measured by whether all stakeholders are satisfied with the results of policies and decisions which have been made through the multistakeholder process, but rather by whether the overall organization is able to achieve its mission while promoting trust and accountability amongst its various stakeholders.

In this regard, ICANN has faced challenges in two critical areas of compliance, its actions taken in response to the implementation of the EU's General Directive on Privacy Regulations (GDPR) and its interpretation and enforcement of its own contractual agreements with registrars and registry operators. How ICANN addresses these challenges over the short to medium term will be important to the future viability of the multistakeholder approach to Internet governance. Despite these challenges, INTA does not take the view that the IANA transition should be unwound. INTA would vastly prefer that steps be taken to improve and enhance the effectiveness of the multistakeholder model. Our suggested approaches are below.

## **2. ICANN Must Address Its Patchwork Approach to GDPR Compliance**

ICANN and the multistakeholder community must act with urgency to address the patchwork approach to GDPR. INTA is concerned that the Temporary Specification approved by the ICANN Board is a flawed and incomplete solution to the immediate needs of law enforcement, public safety and child protection organizations and intellectual property owners, as well as others with legitimate interests in accessing essential registrant contact information in the Registration Directory Service commonly referred to as, "WHOIS".

For many years, WHOIS has performed a similar function to that performed by trademarks because it fosters accountability through attribution. This accountability, in turn, helps to ensure the stable and secure operation of the Internet's unique identifier systems. Access to registrant data in WHOIS is a fundamental tool that is universally used to detect, prevent, and address a wide range of harms, including: 1) sites that offer counterfeit goods and services; 2) sites that support schemes that perpetrate identity-theft, steal credit card information, and divert funds to large-scale criminal enterprises; and 3) domains/sites that cloak themselves with the legitimacy of a familiar brand (or offer access to infringing content) as a means to distribute malware and perpetrate fraud. Access to accurate WHOIS information also supports a range of other activities necessary for the conduct of business and facilitation of commercial, social, and economic activities, including those that support democracy and access to accurate information (*i.e.*, helping media consumers to identify fake news). Without access to reliable and accurate WHOIS data, efforts to protect consumers will be thwarted, leading to a rise in abusive activity, damage to cybersecurity, diminished trust in online marketplaces, and increased costs and burdens for public law enforcement agencies, cybersecurity professionals, registrars, registries, and consumers.

ICANN had professed a desire “to identify the appropriate balance for a path forward to ensure compliance with the GDPR while maintaining the existing WHOIS system to the greatest extent possible.”<sup>3</sup> INTA shares that desire for balance but the Temporary Specification is out of balance. It over-applies the GDPR by applying its provisions globally (regardless of whether there is an EU point of attachment for GDPR compliance), and to registrations of both natural and legal persons (even though data of legal persons, to the extent such data does not reflect “personal data”, is not within the scope of the GDPR). It appears that this broad-brush approach disproportionately benefits registrars and registry operators and goes well beyond the scope of the GDPR. It is directly contrary to ICANN’s stated aim of preserving the existing WHOIS as much as possible. Furthermore, the Temporary Specification fails to provide public access to a registrant’s actual email address (as supplied by the registrant to the registrar and then verified by the registrar). ICANN, instead, mandates the provision of a web form or anonymized email, which detrimentally impacts law enforcement, consumer protection, and cybersecurity/anti-malware efforts. As others have noted,<sup>4</sup> the registrant’s email address is typically the most important data point to have for those efforts, for several reasons. It is often the most accurate data point (since a working email address is necessary for the registrar and registrant to communicate about payments, expirations, etc.). It enables investigators to link domains and actors together that are involved in abusive and illegal activity (for example, through Reverse WHOIS). And finally, it enables investigators to identify the victims of phishing scams performed with the help of compromised domains.

Despite ICANN’s purported concerns with WHOIS fragmentation, that is precisely what has happened. Instead of a uniform, common framework for collection, display, and access for WHOIS data, there are now a complex array of policies, web forms, and processes set by registrars, which have for all practical purposes reduced access to this data for enforcement purposes to a trickle. It is INTA’s belief based on anecdotal reports from its members, that requesting registrant data is either futile or too opaque to navigate. It is too soon to accurately ascertain the true impact of this on illegal online activity, but it has unquestionably deprived INTA members with perhaps their most important tool for investigating and addressing infringement.

Finally, while the Temporary Specification requires registrars and registry operators to provide reasonable access to registrant data for legitimate purposes (provided it does not outweigh the privacy rights of the individual registrant), there is no further clarity for stakeholders as to what that really means. This leaves unresolved what may be the most important question of any interim compliance model: Who can access non-public WHOIS data, and by what method?

ICANN has identified the need for an access and accreditation framework as part of “future work”, and has recently proposed a high-level framework for Uniform Accreditation based on codes of conduct, essentially punting on the problem, leaving those with legitimate interests to essentially fend for themselves.

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<sup>3</sup> See, e.g., <https://www.icann.org/news/blog/data-protection-privacy-update-seeking-input-on-proposed-interim-model-for-gdpr-compliance>; <https://www.icann.org/news/blog/data-protection-and-privacy-update-plans-for-the-new-year>.

<sup>4</sup> See, e.g., <https://www.icann.org/en/system/files/files/gdpr-comments-coa-icann-proposed-compliance-models-16feb18-en.pdf>; <https://www.icann.org/en/system/files/files/gdpr-comments-ipc-icann-proposed-compliance-models-29jan18-en.pdf>.

A high-functioning multistakeholder process works when there are incentives for stakeholders to cooperate and reach consensus. In theory, a layered access model could strike the right balance and compromise if stakeholders were tasked with the imperative of reaching agreement on a set of principles that would govern both the removal of access to data in WHOIS as well as access to it in appropriate circumstances.

The Temporary Specification addresses only half of the issue, leaving the future viability of a layered access model in doubt. This is because the community is now tasked with concluding an Expedited Policy Development Process (“EPDP”) to replace the Temporary Specification, which will expire in less than eleven months. As ICANN deferred the access/accreditation question, the EPDP appears to be relegating access/accreditation as a secondary priority. While INTA is encouraged that the scope of the EPDP has recently been amended to include more focus on access/accreditation questions, the approach is still lop-sided. There is a real risk that the access/accreditation problem will not be resolved in a timely or balanced manner. This would not be the best outcome for the multistakeholder community and could undermine the credibility of the multistakeholder model itself.

INTA suggests that NTIA prioritize the following in its efforts both at ICANN within the GAC and within the US administration and Congress to:

- (i) Ensure that access and accreditation are addressed with equal prominence to the restriction of access to WHOIS data, whether as part of the EPDP, or in a parallel process; and
- (ii) Highlight the need for balanced policies which do not over-comply with privacy protections such as the GDPR, which includes maintaining public access to as much data as is reasonable, and addressing access to non-public data for legitimate interests.

### **3. ICANN Monitoring and Enforcement of Contractual Compliance**

The effective enforcement of contracts between ICANN and registrars and registry operators is a further essential ingredient for the success of the multistakeholder ecosystem. Standards of conduct and policies need to be clear and enforceable. Efforts taken to monitor and enforce these standards need to be transparent. INTA is concerned that the enforcement of the contractual provisions which are designed to address domain-related abuse has not been a transparent and effective as it is intended to be. INTA appreciates the efforts of ICANN’s compliance team using the tools at their disposal. However, their activities could be more effective if they were able to take clearer positions on the obligations of registrars and registry operators to respond to and address complaints of abuse. ICANN needs to be able to do more to clarify robust standards for such parties to take action against such abuse that is effective and measurable.

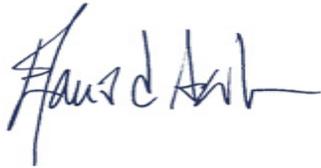
This may be achieved through consideration of the following:

- (i) Clarifying the interpretation of contractual obligations to investigate and address allegations of abuse, including those related to termination of registrant agreements for using the domains to commit blatantly illegal activity;
- (ii) Providing ICANN’s compliance team with independence from the oversight of the Global Domains Division, which is closely related to the interests of registrars and registry operators, and which may inherently prevent ICANN’s compliance team from taking more robust action for breach of agreements;

- (iii) Enhancing transparency mechanisms so that the community has greater visibility into how complaints are addressed.

INTA thanks NTIA in advance for its consideration of this submission. For more information about INTA and its policies, you may contact Lori Schulman, Senior Director for Internet Policy, [lschulman@inta.org](mailto:lschulman@inta.org).

Sincerely,



Etienne Sanz De Acedo  
Chief Executive Officer

### About INTA

Founded in 1848, INTA is a global not-for-profit association with more than 7,200 member organizations from over 191 countries. One of INTA's goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last two decades, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA's Internet Committee is a group of over 150 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.